

120

(3)

No. 08-1006

Supreme Court, U.S.
FILED

APR 13 2009

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SHANTEE MAHARAJ, Individually and as
Executrix of the Estate of D. DEV MONGA,

Petitioner,

v.

SCOTT E. SOMMER, Executor of the Estate of
PAUL F. SOMMER; JOHN C. OTTENBERG, ESQ.,
Receiver of D. DEV MONGA, CORE ENVIRONMENTAL
RESOURCES, INC., and SUBSURFACE
TECHNOLOGIES, INC.; VANGUARD FIDUCIARY
TRUST CO.; VANGUARD/MORGAN GROWTH FUND,
INC.; DREYFUS FOUNDERS FUNDS, INC.;
CITADEL SERVICE CO., INC.; and
INVESTORS FIDUCIARY TRUST CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

**BRIEF IN OPPOSITION FOR RESPONDENT
SCOTT E. SOMMER, EXECUTOR OF THE ESTATE
OF PAUL F. SOMMER**

PETER S. BROOKS

Counsel of Record

JASON J. JARVIS

SEYFARTH SHAW LLP

Two Seaport Lane

Boston, MA 02210

(617) 946-4800

Attorneys for Respondent

*Scott E. Sommer, Executor of
the Estate of Paul F. Sommer*

QUESTION PRESENTED

Whether the decision below denying Petitioner relief from the loss of certain accounts purported to be Individual Retirement Accounts ("IRAs") violates this Court's disentitlement jurisprudence, due process, or the Supremacy Clause, where neither the Petitioner nor her late husband, the original owner of the accounts, filed proofs of claim as to those accounts as required by the Court below and where they engaged in "years of contumacious conduct."

TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE PETITION	5
I. The Circumstances Underlying the Petition Are Unique and Exceptionally Unlikely to Arise Again.	6
II. Maharaj Has Waived Her Claims.	7
III. There Is No Conflict Between the Decision Below and Any Decision Of This Court, Federal Law, or the Constitution.	8
IV. Any Decision Of This Court May Be Advisory	10
CONCLUSION	13

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases:	
<i>Carey v. Phipus</i> , 435 U.S. 247 (1978)	9
<i>Conway v. California Adult Authority</i> , 396 U.S. 107 (1969)	12
<i>Degen v. United States</i> , 517 U.S. 820 (1996)	8, 9
<i>Dusenbery v. United States</i> , 534 U.S. 161 (2002)	9
<i>Guidry v. Sheet Metal Workers Nat'l Pens. Fund</i> , 493 U.S. 365 (1990)	10
<i>Herb v. Pitcairn</i> , 324 U.S. 117 (1945)	12
<i>Nat'l Collegiate Athletic Ass'n v. Smith</i> , 525 U.S. 459 (1999)	11
<i>Patterson v. Shumate</i> , 504 U.S. 753 (1992)	10
<i>Rice v. Sioux City Mem'l Park. Cem.</i> , 349 U.S. 70 (1955)	7
<i>Rousey v. Jacoway</i> , 544 U.S. 320 (2005)	10

Cited Authorities

	<i>Page</i>
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998)	10
<i>Ticor Title Ins. Co. v. Brown</i> , 511 U.S. 117 (1994)	12
United States Constitution:	
Article III	10
Rule:	
Sup. Ct. R. 10	5

INTRODUCTION

This case involves a remarkable set of facts whereby the Petitioner, Shantee Maharaj ("Maharaj") and her late husband, D. Dev Monga ("Monga") undertook a complex scheme to defraud their judgment-creditor, Respondent Paul Sommer, in an effort to avoid paying the results of a jury verdict. Maharaj and Monga's conduct included years of hiding assets and themselves up through and including both of the initial parties' deaths (Monga and Paul Sommer).¹ Their conduct resulted in multiple findings of contempt against Monga, a member of the Massachusetts Bar, several collateral attacks against the judgment that ended in sanctions being leveled against Monga, and then seizure of assets by a receiver appointed by the court to find and secure assets to satisfy the judgment. The court below eventually disposed of the assets in receivership, dismissed the receiver, and rejected Maharaj's argument that the IRAs should not have been included in the receivership estate.

Although the facts may be remarkable and complex, whether to deny the Petition is a simple question because Maharaj waived her claim that the so-called IRAs are immune from seizure. Maharaj had an opportunity to challenge the seizure of those assets and she failed to do so. Moreover, Maharaj lacks standing to raise her claims in the first place because her rights were derivative of Monga's rights, who also waived his right to challenge the propriety of the seizure. There is

1. Paul Sommer's brother, Scott Sommer, is executor of Sommer's estate.

nothing in this Court's jurisprudence or in the Constitution that protects litigants who knowingly and intentionally waive their rights. The decisions of this Court cited in the Petition are not on point. Nor is due process implicated here, where there was clear notice and opportunity to be heard. The Supremacy Clause is immaterial because the issue is not whether IRAs are generally protected, but whether Maharaj here waived her right to raise that concern.

This Court should also not grant Certiorari because this Court would be offering nothing more than an advisory opinion if the IRAs were found on remand to not be validly-protected IRA assets. Maharaj offers evidence for this Court to consider in finding that the IRAs are wholly legitimate. But there was no finding by the court below that the IRA assets were in fact protectable in the first place. Thus, even if this Court agreed with everything in the Petition and reversed the decision below, the case would still need to be remanded for a factual finding of whether the challenged accounts are in fact protected. This Court has repeatedly rejected taking on academic questions in this kind of fact-finding and ultimately advisory role.

Underlying each of these points is the Petition's essential deficiency: its failure to "focus upon the law." (Petition at 38 n.37). Instead, Maharaj offers only a "thumbnail sketch of Maharaj's federal claims and their factual predicate, with an emphasis towards the latter. . . ." (*Id.*). Indeed. As the Petition does not raise a compelling issue of federal or constitutional law and there is no conflict with any decision of this Court, the Petition should be denied.

STATEMENT OF THE CASE

Following a jury verdict on behalf of Sommer against Monga and his two companies, the Massachusetts Superior Court found that the defendants' assets had been commingled together with the assets of Maharaj, and that Monga had "concealed the assets of all four." (Petitioner's Appendix ("App.") 247). Finding Monga in contempt for repeated violations of an injunction that prohibited asset transfers and for failing to supply post-judgment discovery, the superior court issued a *capias* for his arrest. (App. 28). The court also appointed John Ottenberg, Esq., as receiver to take control of the assets of the defendants and Maharaj. (App. 247). With respect to those assets, the court ordered that "the defendants, and Maharaj . . . are hereby required and ordered to deliver to said receiver all the property, monies, stock in trade and effects of every kind and nature, belonging to the defendants in their hands, possession, or control. . . ." (*Id.* 247-48).

Despite extreme efforts by Monga and Maharaj to hide their assets, Ottenberg identified a number of commingled or concealed assets, including certain assets purported to be IRAs that are the subject of the Petition. (App. 136-37). Ottenberg requested and obtained specific orders requiring the transfer of those accounts into the receivership. (*Id.*). The superior court then entered an order requiring all creditors to file proofs of claim by September 15, 1994. (*Id.*). Monga filed a proof of claim for back vacation pay that he claimed was due to him, but neither he nor Maharaj filed any proofs of claim as to the so-called IRAs. (*Id.*) As no proof of claim had been filed on the IRAs, Ottenberg filed a complaint

to resolve their status and how they should be distributed to satisfy Sommer's judgment. (App. 140).

Monga died on August 23, 1996, and Maharaj was added to the action as the administratrix of his estate.² (*Id.*) On October 29, 1996, Ottenberg sought summary judgment as to the IRAs and Maharaj attempted to remove the case to the United States District Court. (App. 140-41). After six years in hiding, in June 1998, Maharaj entered a "special appearance" and filed, among other things, a motion to dismiss Ottenberg's complaint to turn over the IRAs. (App. 142). The superior court, however, found that Monga and Maharaj had waived any right to assert a claim of a statutory exemption to seizure of the IRAs by their continued defiance of court orders, including their failure to "turn over to the receiver all of [their] assets. . .". (App. 143-44). Thus, Ottenberg was entitled to possession of the IRAs, after deduction of various attorneys' fees. (*Id.*). Subsequently, the superior court entered a Judgment on Receivership dated August 1, 2000, ordering the disbursement of the funds. (App. 130-31).

2. Monga appealed the underlying jury verdict, but based on his failure to abide by the superior court's injunction prohibiting the transfer of assets and Monga's failure as well to provide post-judgment discovery, Sommer moved to dismiss Monga's appeal of the underlying jury verdict. (App. 139-40). In January of 1994, the Massachusetts Appeals Court ordered Monga's appeal dismissed unless Monga surrendered on the *capias* and purged himself of the contempt. (App. 30). Monga refused and final judgment was entered for Sommer in 1994. (*Id.*) Ultimately, Monga petitioned this Court for certiorari on that appeal, which this Court denied. 513 U.S. 1169 (1995).

The Massachusetts Appeals Court reversed in part, finding that the multiple incidents of contempt was insufficient grounds to deny Maharaj the right to challenge the propriety of the IRAs' seizure and disbursement. (App. 62-63). The appeals court did not address the waiver issue raised below and relied on by the superior court. (*See id.*) On further review, the Supreme Judicial Court focused upon the "extreme facts of this case" in denying Maharaj the right to challenge the seizure (App. 32), and noted the failure of Maharaj and Monga to preserve their arguments as to the seized property. (App. 31). The Supreme Judicial Court held this case to be "the rare example of one involving conduct so egregious as to warrant the forfeiting of a right to be heard" and reversed the appeals court. (App. 32). The Petition followed.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted here for several independent grounds. First, the case is so unusual that there is little likelihood of another similar case arising. Second, the Petitioner waived her claim to the IRAs. Third, the decision below does not conflict with any decision of this Court and does not implicate a federal question that has not been decided by this Court. Finally, because the factual issue of whether the assets were in fact valid IRAs remains outstanding, a decision of this Court could be no more than advisory. Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. Sup. Ct. R. 10.

I. The Circumstances Underlying the Petition Are Unique and Exceptionally Unlikely to Arise Again.

The circumstances surrounding the seizure of the assets that Maharaj claims to be entitled to protection are extraordinarily rare, if not unique. They are unlikely to arise again in any context and thus do not warrant granting the Petition.

A complete history of the conduct of Maharaj and her late husband, Monga, would be massive and is unnecessary. The Statement of the Case adequately describes the posture of this matter. Monga and Maharaj repeatedly and purposefully violated court orders in an effort to shield their assets from seizure to satisfy a jury verdict. This was not just a single instance of contempt. These efforts included commingling and concealment of assets and their residence, the transfer of hundreds of thousands of dollars out of the country, refusal to appear even under a *capias*, total disregard for court orders compelling discovery, threats to third parties who received subpoenas to produce records, and declining the many opportunities afforded to purge the contempt. Their efforts in this regard were so substantial and maintained over such a long period of time that Respondent is not aware of their equal in any reported case in American jurisprudence.³

3. The unique nature of this case also disabuses Maharaj's clichéd imaginary horrible of millions of suddenly-seized IRAs. (See Petition at 31-32).

Accordingly, there is no need for this Court to revisit the extensive but bizarre history of this case. The Massachusetts Supreme Judicial Court held that under the unique facts set forth above, Maharaj would not be afforded yet another opportunity to challenge the propriety of the IRAs' seizure. This Court need not reexamine that question because it is exceptionally doubtful that it will arise again. *See, e.g., Rice v. Sioux City Mem'l Park. Cem.*, 349 U.S. 70, 74 (1955) (noting that "this Court does not sit to satisfy a scholarly interest . . . [n]or does it sit for the benefit of the particular litigants.").

II. Maharaj Has Waived Her Claims.

Maharaj may not challenge the propriety of the IRA seizure before this Court because she and/or Monga failed to file proofs of claim as required by the superior court. Following the underlying jury trial and judgment, Monga was ordered to turn over all of his assets to the receiver. He refused to do so. He was specifically ordered to turn over the IRAs. He refused to do so. Instead, Monga and Maharaj fled the jurisdiction and began a complicated series of actions designed to hide assets and themselves from the court, including filing collateral lawsuits against the receiver and Sommer's counsel in multiple courts around the country.

The receiver eventually was able to freeze the IRAs, recover some assets, and request that the court set a bar date for claims by creditors to those assets. The court ordered interested parties, including Monga, to file proofs of claim against the assets seized by the

receiver. Neither Monga nor Maharaj submitted a proof of claim to any of the so-called IRA assets seized by the receiver. Their claims were therefore waived and cannot be resurrected here.

III. There Is No Conflict Between the Decision Below and Any Decision Of This Court, Federal Law, or the Constitution.

Maharaj purports to rely on the Due Process and Supremacy Clauses of the United States Constitution in arguing that the decisions below implicate a substantial federal question that conflicts with prior decisions of this Court. The chief decision of this Court that Maharaj relies on is *Degen v. United States*, 517 U.S. 820 (1996). As articulated by Maharaj, the purported conflict appears to be that the decision of the Supreme Judicial Court did not rely on or distinguish *Degen* when it denied Maharaj the right to challenge the disposition of the so-called IRAs.

In *Degen* this Court considered whether a court in a civil forfeiture suit may enter judgment against a claimant on the basis that he is a fugitive from a related criminal prosecution. *Id.* at 823. Holding that the federal district court in that case had less severe means of enforcing its orders than the total disentitlement of the petitioner in *Degen*, this Court reversed the judgment.

Degen is distinguishable on a number of levels, the most important of which is its critically distinct posture. In *Degen*, the defendant-petitioner had appropriately challenged the civil forfeiture proceeding and the only basis for striking his filings was his refusal to appear

for his criminal prosecution. Here, the superior court offered Maharaj and her late husband the opportunity to file proofs of claim as to the IRAs and they failed to do so. (App. 140). In fact, Monga filed claims with the receiver but not on the IRAs. (App. 30). Monga and Maharaj were thus offered an opportunity to be heard on the validity and proper disbursement of the IRAs and chose, as they had done multiple times before, to ignore the superior court's order. That they waived their right to challenge the propriety of disbursement of the IRAs does not implicate *Degen* primarily because in *Degen*, the defendant-petitioner was offered no such opportunity to challenge the forfeiture.

Nor does the Due Process Clause support granting the Petition. Due process is easily satisfied here because Monga and Maharaj were offered opportunities to challenge the propriety of the seizure (both when the assets were required to be turned over to the receiver and when proofs of claim were required to have been filed). They rejected those opportunities, instead bringing multiple collateral attacks on the receivership in other courts and dragging the litigation out for over six extra years. Only after those efforts were rejected did they revisit the merits of their claim. Due process does not shield dishonest litigation tactics. Due process requires reasonable notice and an opportunity to be heard. *See, e.g., Dusenbery v. United States*, 534 U.S. 161, 167 (2002) (reasonable notice and opportunity to be heard satisfies due process); *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (noting that procedural due process does not protect from the deprivation of property, but rather "from the mistaken or unjustified" deprivation of property). Reasonable notice and opportunity was offered to Maharaj here.

Finally, Petitioner also points to three decisions of this Court in emphasizing the special character of certain retirement assets such as IRAs, tangentially suggesting that the Supremacy Clause requires a reversal of the decision below: *Guidry v. Sheet Metal Workers Nat'l Pens. Fund*, 493 U.S. 365 (1990); *Patterson v. Shumate*, 504 U.S. 753 (1992); and *Rousey v. Jacoway*, 544 U.S. 320 (2005). These cases each describe the parameters of statutory asset exemptions, whether under ERISA (*Patterson* and *Guidry*) or the Bankruptcy Code (*Rousey*). But the issue in this case is not the validity of the IRAs or the scope of any exemption — the issue is whether Maharaj and Monga forfeited their rights by their conduct. The Petition is therefore unwarranted on this basis as well.

IV. Any Decision Of This Court May Be Advisory

Article III entrusts to this Court only “cases and controversies.” U.S. Const. art. III. It is the Petitioner’s burden to demonstrate Article III standing, including the element of “a likelihood that the requested relief will redress the alleged injury.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-04 (1998) (citation omitted). Maharaj has not attempted to and cannot meet this burden.

The decision below reflects that the superior court had ordered that “all” assets, of any character whatsoever, be transferred to the receiver. (App. 136-37). Monga and Maharaj refused to comply with that order. The receiver ultimately identified certain assets, including some labeled as Individual Retirement Accounts. In order to challenge the seizure of those

accounts on the basis that they were not subject to receivership and distribution to satisfy the outstanding judgment, Monga and Maharaj were required to file proofs of claim. They did not file a proof of claim on those assets.

The superior court consequently had “no occasion to consider which of the various statutory exemptions would apply, and what proportion of the assets in the accounts would be exempt.” (App. 144-45). Instead, it froze, but did not rule on the merits of any statutory exemption for, the IRAs:

Had Monga obeyed the order [requiring all assets to be turned over to the receiver] he would have been free, under its plain terms, to present to the Court his contention that some or all of the assets in these accounts were subject to statutory exemptions from claims of creditors, and for that reason should be returned to him.

(App. 144). The superior court never had occasion to make a finding on that question, however, because of Petitioner’s refusal to comply with the order requiring proofs of claim.

The Petition expends considerable effort introducing factual evidence (*see* Petition at 15-17) for this Court to weigh as to the IRAs’ alleged conclusiveness as properly exempt assets. But that determination was never made and original fact-finding is not a function of this Court. *See Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 470 n.7 (1999)

(recognizing that this Court does not consider for the first time issues or facts not decided below).

Put another way, if Maharaj were to prevail in this Court, the case would still have to be remanded to the lower court to make a determination it never reached due to Maharaj's own intransigence. And if the accounts were found not to be exempted accounts, then the decision of this Court would have been rendered advisory, which this Court has repeatedly sought to avoid. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (recognizing that the Court will not "render an advisory opinion" as would be the case "if the same judgment would be rendered by the state court after we corrected its views of federal laws . . ."); *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969) (certiorari dismissed as improvident, because "artificial and hypothetical issue" requested "an advisory opinion"); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (dismissing the writ of certiorari as improvidently granted because deciding the case required resolution of a hypothetical question).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

PETER S. BROOKS
Counsel of Record
JASON J. JARVIS
SEYFARTH SHAW LLP
Two Seaport Lane
Boston, MA 02210
(617) 946-4800

Attorneys for Respondent
Scott E. Sommer, Executor of
the Estate of Paul F. Sommer